Supreme Court, U.S.
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No. 93-442

In the Supreme Court of the United States

OCTOBER TERM, 1993

PATRICIA B. FARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. 2410 authorizes suit against the United States to quiet title to property to which the government holds title, rather than a lien.

2. Whether the disclosure of federal tax return information pursuant to tax collection efforts is actionable in a suit for damages under 26 U.S.C. 7431.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-22) is reported at 990 F.2d 451. The order of the district court (Pet. App. 23-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1993. The petitions for rehearing were denied on June 21, 1993. Pet. App. 33. The petition for a writ of certiorari was filed on September 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner did not file federal income tax returns for the years 1979 through 1982. The Internal Revenue Service assessed petitioner's tax liability and issued notices of levy to her employer, United Air Lines. Pursuant to the notices of levy, United Air Lines paid a portion of petitioner's wages over to the United States (Pet. App. 12).

Petitioner then commenced this suit in district court. She asserted that the levies on her wages were procedurally invalid because the IRS had failed to issue notices of deficiency, notices of assessment and demand for payment, and notices of seizure (Pet. App. 25). She also alleged that the IRS had improperly disclosed tax return information to her employer in issuing the notices of levy (*ibid.*). Petitioner requested a return of the funds collected by the IRS, a declaration that the IRS's notice of tax lien was void, a declaration that the IRS levies were void, an injunction against further levies, and damages (under 26 U.S.C. 7431) for the allegedly unauthorized disclosure of her confidential tax information (Pet. App. 25).

The district court dismissed the action. The court noted that the Form 4340 Certificates of Assessments and Payments demonstrated that all of the required notices had been sent by the IRS in assessing petitioner's taxes and levying upon her wages (Pet. App. 26-27). The court therefore concluded that petitioner had failed to state a cause of action under 28 U.S.C. 2410 against the United States (Pet. App. 27).

2. The court of appeals affirmed in part and reversed and remanded in part (Pet. App. 12, 22). The court held that, to the extent that petitioner sought

an injunction and declaratory relief against the collection of her taxes, her action was barred by 26 U.S.C. 7421 (Pet. App. 13).[1] The court also held that petitioner's action to quiet title to her wages was not authorized by 28 U.S.C. 2410 with respect to wages that had already been paid over to the government (Pet. App. 14).[2] The court of appeals held, however, that 28 U.S.C. 2410 did authorize petitioner's challenge to the continuing levy upon her prospective wages (*ibid.*). The court therefore remanded the case to the district court for consideration of the merits of petitioner's challenge to the continuing levy on her wages (Pet. App. 22).

The court of appeals further held that the district court properly dismissed petitioner's claim that her confidential tax information was wrongfully disclosed in the notices of levy. The court concluded that the information disclosed in the notices of levy was necessary to the collection activity of the government and that the disclosures therefore fell "squarely within the exemption" provided in Section 6103(k)(6) of the Internal Revenue Code (Pet. App. 17).

ARGUMENT

1. It is well settled that the United States may not be sued without its consent and that the terms of its consent define the court's jurisdiction. *United States*

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[1] 26 U.S.C. 7421 provides, in relevant part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." See also 28 U.S.C. 2201(a).

[2] Petitioner's remedy for taxes already collected would be a refund action, in which she would be required to establish that the taxes in fact were not owed.

v. *Dalm*, 494 U.S. 596, 608 (1990). Any waiver of the government's immunity to suit must be explicit and is strictly construed. *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *Soriano* v. *United States*, 352 U.S. 270, 272 (1957). When the United States has not consented to suit, the action should be dismissed. See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *Elias* v. *Connett*, 908 F.2d 521, 527 (9th Cir. 1990).

Petitioner brought this suit to quiet title to her wages, a part of which the government had seized pursuant to a tax levy. 28 U.S.C. 2410 permits an action to be brought against the United States to quiet title to "real or personal property on which the United States has or claims a mortgage or other lien." In such "quiet title" actions, taxpayers may challenge the procedural regularity of liens, seizures and sales of property in which the United States claims a lien. In such actions, however, taxpayers may not challenge the substantive validity of the underlying tax assessment. See, *e.g.*, *Guthrie* v. *Sawyer*, 970 F.2d 733, 735 (10th Cir. 1992); *Geiselman* v. *United States*, 961 F.2d 1, 4 (1st Cir.), cert. denied, 113 S. Ct. 261 (1992); *Hughes* v. *United States*, 953 F.2d 531, 537-539 (9th Cir. 1992); *Stoecklin* v. *United States*, 943 F.2d 42, 43 (11th Cir. 1991); *Kulawy* v. *United States*, 917 F.2d 729, 733 (2d Cir. 1990); note 2, *supra*.

28 U.S.C. 2410 authorizes suits only when the United States "has or claims" a lien on the property. *Ibid.* When the government has already obtained title and possession of the property, as contrasted with a mere lien interest, Section 2410 does not authorize suit. See *Bertie's Apple Valley Farms* v. *United*

States, 476 F.2d 291, 292 (9th Cir. 1973); *Bank of Hemet* v. *United States*, 643 F.2d 661, 665 (9th Cir. 1981); *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 737 (5th Cir. 1980); *Hughes* v. *United States*, 953 F.2d at 538. When, as here, the wages of a delinquent taxpayer have been paid over to the government, the United States has title, not merely a lien, in the money that has been paid over. See *Hughes* v. *United States*, 953 F.2d at 538; *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d at 737. The court of appeals therefore correctly held (Pet. App. 14) that the quiet title provisions of 28 U.S.C. 2410 are not applicable to petitioner's claim for recovery of funds paid to the United States. The taxpayer's remedy in this situation is a tax refund suit under 26 U.S.C. 7422, which may be commenced only after full payment of the tax and the filing of an appropriate administrative claim for refund. See also note 2, *supra*.

Contrary to petitioner's contention (Pet. 6-7), the decision in this case is not inconsistent with this Court's holdings in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), and *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985). In those cases, the Court held that the government's seizure of property does not transfer ownership but instead brings the property into the government's legal custody. This custodial relationship allows the government to sell the property to satisfy the taxpayer's delinquent tax obligation. Ownership of the property is transferred only when the property is sold at tax sale. See *United States* v. *Whiting Pools, Inc.*, 462 U.S. at 211. It is not necessary, however, for the government to conduct a sale when money is

seized to satisfy the taxpayer's debt. Because no further steps are necessary for the government to receive payment of its debt, the seizure of money is sufficient by itself to establish that the government's interest is not merely a "lien" interest. See, *e.g.*, *Hughes* v. *United States*, 953 F.2d at 538.

Petitioner also errs in contending (Pet. 6) that the decision in this case conflicts with *Kulawy* v. *United States*, 917 F.2d 729 (2d Cir. 1990). In that case, the Second Circuit held that the question whether Section 2410 authorizes suit in a particular case must be determined upon the facts that exist at the time the lawsuit is commenced. The court concluded that there was jurisdiction over the taxpayer's quiet title action in *Kulawy* because, at the time that lawsuit was commenced, the government had only a lien on the property. 917 F.2d at 733-734. In the present case, by contrast, when petitioner commenced her suit, the government did not hold merely a lien interest in her wages but had possession and title to the funds that she sought to recover.[3] The holding in the present case that a quiet title action will not lie with respect to funds that have come into the possession of the United States *before* the lawsuit is commenced does not conflict with the decision in *Kulawy*.[4]

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[3] Petitoner errs in asserting (Pet. 5-6) that the decision in this case conflicts with the same court's earlier decision in *Goodwin* v. *United States*, 935 F.2d 1061 (9th Cir. 1991). *Goodwin* involved the seizure of real property that had not been sold at the time suit was commenced. Petitioner's claim of an intra-circuit conflict would not, in any event, warrant further review by this Court.

[4] The decision in *United States* v. *Sullivan*, 333 F.2d 100 (3d Cir. 1964), concerned the IRS's levy upon a delinquent

2. Section 6103(k)(6) of the Internal Revenue Code authorizes the disclosure of taxpayer return information "to the extent that such disclosure is necessary in obtaining information * * * with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title." 26 U.S.C. 6103(k)(6). As the court of appeals correctly concluded, the Internal Revenue Service issued the notices of levy involved in this case to obtain information "necessary to the collection activity" and the notices thus fell "squarely within the exemption under section 6103(k)(6)" (Pet. App. 17).[5]

The cases that petitioner identifies as in conflict with the decision in this case (Pet. 9) involve distinctly different factual situations. For example, *Rorex* v. *Traynor*, 771 F.2d 383 (8th Cir. 1985), concerned the question whether Section 6103(k)(6) could authorize a disclosure in a notice of tax levy that was issued at a time when the taxpayers were *not* delinquent in any tax obligation. In that context, when there was no lawful basis to seek collection of taxes from a taxpayer who had "not neglected or

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taxpayer's interest in unmatured insurance policies in a lien foreclosure action. That decision does not address the question whether the IRS obtained a title interest in the property it seized.

[5] Treasury regulations authorize any revenue officer to disclose return information in connection with official duties relating to any collection activity, in order to obtain information necessary "to apply the provisions of the Code relating to establishment of liens against such assets, or levy on, or seizure, or sale of, the assets to satisfy any such liability" (26 C.F.R. 301.6103(k)(6)-1(b)(6)).

refused to pay any tax," the court concluded that Section 6103(k)(6) could not authorize a disclosure of return information.[6] 771 F.2d at 386. And, in *Rodgers* v. *Hyatt*, 697 F.2d 899 (10th Cir. 1983), the court addressed the factually distinct question whether information that had previously been disclosed nonetheless remained subject to "the confidentiality requirements of § 6103" (697 F.2d at 902). Other courts that have addressed the question presented here have reached conclusions consistent with the court's holding in this case. See *Maisano* v. *United States*, 908 F.2d 408 (9th Cir. 1990); *Flippo* v. *United States*, 849 F.2d 604 (4th Cir. 1988) (Table), aff'g per curiam 670 F. Supp. 638 (W.D.N.C. 1987).

3. In any event, the case presented on this petition is in a wholly interlocutory posture. The court of appeals remanded the case to the district court for further consideration under 28 U.S.C. 2410 of petitioner's challenge to the continuing levy on her wages. See Pet. App. 16. Further review at this time of the interlocutory decision of the court of appeals is not warranted. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

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[6] By contrast, the court noted in the present case that, while petitioner claims that she "did not receive" the notices that are to be issued before tax collection efforts are commenced (Pet. App. 16), the IRS presented proof that it had issued them (*id.* at 14).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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